REPORT

OF THE

JUDICIARY COMMITTEE

OF THE

SENATE,

IN RELATION TO

CERTAIN MONEYS

ALLEGED

TO HAVE BEEN DRAWN FROM THE TREASURY BY THE GOVERNOR WITHOUT AUTHORITY OF LAW.

Mr. Williams, Chairman.

Read in Senate, April 9, 1841.

HARRISBURG:
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1841.

REPORT.

The Committee on the Judiciary System, to whom were referred a certain preamble and resolution in the words following, to wit:

"WHEREAS, the Governor of this Commonwealth did, in the month of June, 1839, draw his warrants on the State Treasurer in favor of J. M. Porter, and Ovid F. Johnson, Esquires, each for the sum of five hundred dollars, as attorney fees in the cases of quo warranto against Isaac Darlington and Oristus Collins, and afterwards in the months of August and September of the same year, drew his warrants in favor of the same attorneys for additional fees of five hundred dollars each, in the same cases—in all, for the sum of two thousand dollars, which said warrants have been paid by said State Treasurer: *And Whereas*, sundry other warrants have been since drawn by the said Executive upon the present State Treasurer and his predecessor, for certain other attorney fees, the payment of which warrants has been refused on the ground that payment thereof is not authorized by law—wherefore it is important that legislative action should be had in the premises: Therefore

"*Resolved*, That the Judiciary Committee be instructed to take the subject into consideration and make report thereon as soon as practicable; and if in the judgment of said Committee said disbursements were not authorized by law, that they report an act to prevent the recurrence of a similar error, and providing for the recovery of said sum of money thus illegally disbursed,"

RESPECTFULLY REPORT:

That they have given to the subject thus committed to their charge all that fulness of consideration which an inquiry of so grave a character required at their hands. If they had felt themselves at liberty to yield to the influence of their first impressions, they might have pronounced their judgment on the matters submitted to them with that degree of promptitude which the language of their instructions seemed to demand. With a studious anxiety, however, to test the accuracy of those impressions, they have felt it to be their duty to extend their researches into the public records of this State, for the purpose of ascertaining whether, in all past time, there had been any thing in the shape even of a precedent, to authorize what they conceived to

be not merely a departure from the usual practice of this government, but a palpable violation of that instrument which was established by the people as its primary and fundamental law. They have not been unwilling to take upon themselves the burthen of an examination whose results might perhaps have exeused, though they could not possibly have justified, an infraction of that wholesome provision of the Constitution which denies to the Executive Magistrate an entrance into the publie treasury, except over the threshold of the law, and with the passport of the Legislature in his hands. Their laborious but voluntary inquisition has resulted in the discovery of no example of the exercise of a like power on the part of any former Exeeutive, and they have accordingly been forced backward upon the principles whieh they are about to announee as the issue of their deliberate reflections on this subject.

The resolution to which the attention of your Committee has been direeted, recites *inter alia*, the drawing of four several warrants by the present Executive, upon the Treasury of the Commonwealth for the sum of five hundred dollars each in favor of a certain James M. Porter and Ovid F. Johnson, Esquires, one of those gentlemen being the brother of the said Executive, and the other the Attorney General of the Commonwealth. The consideration suggested for these warrants consisted of professional services alleged to have been rendered by those individuals at the instance of the said Exeeutive, in the prosecution of two several writs of quo warranto issued against Isaac Darlington and Oristus Collins, Esquires, then being the President Judges of the 2d and 15th Judicial Districts of this State. The questions arising in both cases are understood to have been the same. The services, whieh were confined almost entirely to an argument in the Supreme Court, were of course of the like character. It is not pretended that any special legislative authority existed, either for the employment of those gentlemen, or for the payment out of the Treasury of any of the several sums thus disbnrsed upon the warrants of the Governor. The inquiry therefore arises, and it is that which has been assigned to your Committee, whether they have been drawn and paid in conformity with, or in violation of those provisions which the wisdom of the people has incorporated into the fundamental law of the State for the purpose of proteeting the public treasnry from spoliation.

The 22d section of the 1st Article of the Constitution provides, that "no money shall be drawn from the Treasury exeept in pursuanee of appropriations made by law." The wisdom of this provision is so obvious as to require no remark. Its meaning is equally free from obscurity. It was intended to place the Treasury under the immediate guardianship of the Legislature, whose officer the Treasurer is, and whose authority alone is competent to unlock the sources of its supply. Unless, therefore, it can be shown that there was either a fund specially "appropriated by law" for the payment of these fees, or a general lieense to the Exeeutive, by the permission and under the authority of the law-making power, to draw money out of the

Treasury without any limitation other than his own discretion; a power which could not be safely or properly confided to any one man, however exalted—it seems perfectly manifest to your Committee, that the act in question cannot be reconciled with the constitutional prohibition. It has been already suggested that there was no *special* appropriation in the present instance. If there was any *general* authority to which the exercise of so unusual a power can be fairly referred, it has never been pointed out, and your Committee are not even aware of its existence. It only remains, therefore, for them to examine the several reasons which have been assigned in its defence.

Pending this investigation, a communication, not certainly of the most respectful character, was placed in the hands of your Committee, addressed to the Speaker of the Senate, and purporting to be signed by Ovid F. Johnson, the Attorney General of the State, and one of the recipients of the Executive bounty in this case, in which, amongst other passages worthy of remark, they find the following:

"This subject was brought to the notice of the last Legislature, by which, or at least by the Senate, after inquiring into the facts, it was dropped with common consent, because the propriety of the conduct of the Governor was conceded to be indisputably plain."

It may be proper to observe that the suggestion of the writer that this subject was either brought to the notice of the Senate at its last session, or, to use his own language, "dropped" after inquiry, is neither sustained by the recollections of any portion of your Committee, nor verified by a reference to the recorded proceedings of that session. The supposed concession therefore on the part of the Senate, which constitutes so large a portion of the argument of that distinguished functionary, has no other or better foundation than the imagination of the individual who profited so largely by the exercise of the power which he so zealously defends.

The reference, however, to the action of the last Legislature, has led your Committee into an examination of the Journal of the House of Representatives of that session, which has resulted in the discovery of a proceeding in regard to this question—the same doubtless which is relied on by the Attorney General—so curious and characteristic, that they are not unwilling to make their acknowledgments by re-producing it to the light and allowing to that officer the whole benefit of its resurrection. Whether it deserves the name of an *inquiry* and is therefore to be regarded as an estoppel upon the present Legislature, or whether that which is now pleaded by the highest law officer in the State as a voluntary abandonment of the question, and a complete admission of the propriety of the conduct of the Governor, was any thing but a miserable apology for an admitted violation of duty, and the veriest mockery of every thing like investigation, the Senate will be best able to judge upon an exhibition of the whole case. It will be found embodied in a communication made by the Auditor General in reply to a resolution of the House of Representatives, published on pages 392, &c., of the 2d volume of the Journal of the session of 1840, and it is to that very remarkable document, reciting, as it does, the resolu-

tion on which it was founded, and comprising, no doubt, the whole argument in defence of the Executive, that your committee would now invite your attention. It is as follows:

To the Honorable the Speaker and Members of the House of Representatives:

GENTLEMEN:—I had the honor to receive a Preamble and Resolution of the House of Representatives, which is in these words:

"WHEREAS, by the 13th section of the 2d article of the Constitution, the Governor is bound 'to take care that the laws are faithfully executed;' *and whereas*, it appears by his annual message delivered to the House on the 8th inst., that he deemed it his duty to direct proceedings to be instituted in the Supreme Court, against the President Judges of two Judicial districts, who had resigned their offices one day and the next accepted new commissions, for the purpose of evading the provisions of the new Constitution, and defrauding the people out of their doings and their just rights; *and whereas*, it was right and important to the people of the said two Judicial districts that they should have President Judges appointed according to the laws and Constitution, and to the people of this Commonwealth that their Constitution should not be violated, and its construction properly settled; *and whereas*, the Governor could not have so important a work done without the means of paying, (subject to the supervision of the accounting officers,) proper persons to do it; *and whereas*, it appears from the published account of the Auditor General on the finances of the Commonwealth for the year 1839, that O. F. Johnson, the Attorney General (who only receives a salary of three hundred dollars per annum,) and James M. Porter, each received the sum of five hundred dollars in each case for professional services rendered in each of the proceedings instituted against the said two Judges; *and whereas*, that part of the Constitution which says that 'the Governor shall take care that the laws be faithfully executed,' has always been construed to give him power, subject to the supervision of the accounting officers to pay such persons as he may employ, as will be seen by reference to the large sums paid Messrs. Binney, Sergeant, Douglass and others, and to the warrant drawn by Governor Ritner in favor of A. J. Pleasonton, for the sum of five thousand dollars, to pay the troops whom he ordered here last winter; Therefore,

"*Resolved*, That the Auditor General be, and he is hereby required to furnish the House of Representatives with the vouchers, correspondence and opinions, if any whatever passed between himself and the said Ovid F. Johnson and James M. Porter, Esquires, in relation to the said payments; and, also a reference to that part of the Constitution, and the act or acts of Assembly, under which the said fees were allowed by him."

In compliance with the requisition of the said resolution, I now state to the House of Representatives, that the money therein referred to was paid on the warrant of the Governor, in the same manner that money is usually paid for similar expenditures incident to the Exe-

cutive Department. The preamble to the resolution itself refers to the article and section of the Constitution in virtue of which this money was paid. The duty is therein enjoined upon the Governor, of "taking care that the laws be faithfully executed;" this duty he can discharge, only by having possession of the means of doing so. There is always a fund in the Treasury provided for the necessary contingent expenditures of executing the laws. The Governor is the judge in the first instance, of the propriety and reasonable amount of the incidental expenditures, subject of course to the proper accounting department. No one ever doubted or denied this construction of the Constitution and law. Numerous instances have occurred in Pennsylvania, where money was paid as compensation to counsel employed for the Commonwealth, in the same manner that this money was paid; and the present is the first time, I believe, that the right of the Governor to draw his warrant, or the propriety of doing it, has been disputed. I have not yet seen any reason adduced against this mode of proceeding that seems to me to shake for a moment the well settled construction of the Constitution, acted on for many years. On referring to the sum paid for services similar to those rendered by the Attorney General and James M. Porter, Esquires, in the two cases mentioned in the above resolution, I find that they have exceeded the amount of compensation paid to these gentlemen. I do not therefore think it is unreasonable in amount.

I neither had a correspondence with, nor vouchers from, nor exchanged opinions with either of the gentlemen named in the resolution, and consequently have none to communicate. The amount was settled, and the vouchers returned to this department by the State Treasurer, after payment.

As this resolution seems to have a more direct relation to the Governor than to the department of the Auditor General, I have referred it to him for consideration.

I have the honor, gentlemen,
To remain, respectfully,
Your obedient servant,
GEORGE R. ESPY,
Auditor General.

Having thus exhibited in one connected view the resolution which has been so gravely dignified with the name of an *inquiry*, together with the response of the officer by whom the payments in question were supposed to have been allowed, your Committee will now proceed to examine the reasons suggested by these ready apologists of power, in excuse for its unwonted exercise in the present case.

Comment on such a proceeding as the foregoing would seem to be unnecessary. It will doubtless surprise others as it has surprised them. They cannot however forbear a remark on the extraordinary character of the resolution which forms so large a part of the com-

munication which they have just quoted. Instead of a simple, straight-forward inquiry in the usual manner, and in the terms proposed by its original mover, the whole subject appears from the Journals to have been taken out of his hands, tortured and elaborated into a studied *vindication*, and addressed in its present form—that of a leading question—to the accounting officer. That circumstance has not, however, been without its use. Your committee were not sorry to find their own original impressions reinforced by the unanswerable evidence which it afforded, that the majority of the House of Representatives which had thought proper so to fashion an inquiry so reasonable and so appropriate, could not have differed very materially in opinion from themselves, in regard to the legality of the acts to which it referred. If they had entertained a doubt of the correctness of their own first views, it would have been removed by the obvious appearance which this wears of a concerted effort to shelter an admitted delinquency, by defeating every thing in the shape of a fair inquiry. They would not do injustice to those who have preceded them in either branch of the Legislature, but they are at a loss to account in any other way for the very unusual terms in which the resolution was presented. If indeed the House of Representatives had really supposed the drawing of these warrants to have been authorized by the plain provisions of the Constitution, it passes comprehension how it was that they were not willing to send forth the inquiry without an argument, or in such manner that it might be answered without prompting by the Auditor General. Were they fearful that he had acted without advice and would not understand his case? or did they apprehend that he had knowingly violated his duty and would not be able to answer for himself? One or other of these inferences would seem to be irresistible: either of them conveys a poor compliment to the officer. They *inform* him, in the first place, that these warrants were drawn and paid under that provision of the Constitution which makes it the duty of the Governor "to take care that the laws are faithfully executed;" they even reiterate the quotation, and then ask him with the profoundest gravity to refer them to that part of the Constitution under which the said fees were allowed, and he answers with great simplicity by referring them back to their own resolution! Is such a proceeding as this to be characterized by the denomination of an *inquiry?* Is it not rather a refusal of the question altogether, calculated, if it was not really intended, to thwart any honest purpose of investigation into abuses in either department of the Government? That species of argumentative and apologetic interrogatory which indicates, in advance, the answer which it desires, and then demands of the officer to repeat the lesson which it has so kindly taught, may be a very convenient process for the party interrogated, but is certainly not a very efficient instrument in the discovery of truth. The admirable fidelity of the response, which is a mere echo of the inquiry, in the present instance, is a sufficient proof that the lesson was not lost on the Auditor General, and while it demonstrates the true spirit of the investi-

gation by which this Legislature is supposed to have been concluded, presents, at the same time, no feeble illustration of the wisdom of the old common law rule of evidence which would have interdicted such a question in the examination in chief of a witness in any Court of Justice in this country.

The argument itself, which your Committee will now examine, is not less curious than the drapery in which it is involved. It has been reserved for the combined sagacity of the last House of Representatives, and the present Attorney and Auditor Generals of this State, to discover in that hitherto obscure and apparently harmless provision of the Constitution which requires the Governor "to take care that the laws are faithfully executed," a power so formidable as, by authorizing that functionary to draw his warrants *ad libitum*, to bring the whole Treasury of the Commonwealth within his immediate and absolute control, and to repeal in effect, that other equally important provision of the same instrument which declares that "no money shall be drawn from the Treasury except in pursuance of appropriations made by law." The doctrine which has thus been put forth by such high authority, is not less startling for its novelty, than for the exceeding boldness with which it has been proclaimed. The tremendous power which has been thus evoked from the very briefest member of the brief chapter of Executive duties, is one which, in the apprehension of your Committee, is now claimed for the very first time in the political history of this State, and one which, if it exists, was either not understood by those who established our present frame of Government, or has been wisely permitted to sleep in forgetfulness by those who have been from time to time entrusted with its administration. Whether it does or does not exist, is the question which we are called upon to examine in this, the first instance, in which it has probably been either asserted or assumed.

The argument on which this authority is now claimed is, in effect, that a grant of power, or, which is the same thing, an imposition of duty under the Constitution, bears along with it as an incident all necessary means which may be required to carry the power granted into effect, and it is this which is generally known by the name of the doctrine of implied powers. The language of the House resolution is, that "the Governor could not have so important a work done without *the means of paying proper persons to do it*;" that of the Auditor General, equally sententious and oracular, and marvellously correspondent in letter as well as doctrine, that "he (the Governor,) can discharge this duty, (viz. taking care that the laws are faithfully executed,) only by having possession of *the means of doing so*."—The argument, therefore, in both cases, is substantially this—that the Governor cannot perform that portion of his duties unless he has the public Treasury at his command. Your Committee are persuaded that the doctrine of implied or incidental powers has never before been stretched by any, the most latitudinarian construction, to such an extent as to repeal an express provision of the Constitution. That the construction contended for in the present case would have this

effect is perfectly apparent. An authority to draw money from the Treasury without appropriation, under the general duty of "taking care that the laws are faithfully executed," is one which has necessarily no other limitation than the pleasure of the Executive. If he may employ counsel in one case he may do it in every case. If he may draw for two thousand dollars in the way of compensation, he may draw for twenty thousand or two hundred thousand dollars. If he may retain and reward attorneys out of the public Treasury for turning out a *usurping* Judge, he may do the same for the purpose of ousting a *rightful* Judge, and putting a usurper in his place; and it is a notorious fact that the very case just put, and that too as an extreme one, with the view of illustrating the dangers with which such a power would be attended, has already actually occurred. It is one of two other cases referred to in the resolution under which your Committee are now acting, by the description of "sundry other warrants since drawn by the said Executive upon the present State Treasurer and his predecessor, for certain other attorney fees, the payment of which has been refused on the ground that it was not authorized by law," and as the present inquiry has especial reference to the question of their legality, it may be proper in this connection to bring them both before the notice of the Senate.

The unsuccessful attempt under color of a law passed in conformity with the recommendation of the Executive in his annual message, at the last session of the Legislature, and since on solemn argument adjudged unconstitutional by the Supreme Court of this State, to remove Samuel D. Leib an Associate Judge of the county of Schuylkill, was the consideration of the first of these warrants, drawn, as your Committee have been informed, on the late Treasurer, (Almon H. Read,) in favor of a certain Francis W. Hughes, the Deputy Attorney General of that county. The other was a warrant drawn on the present Treasurer, (John Gilmore,) in favor of a certain Joseph B. Anthony, for professional services, alleged to have been rendered by him "in the various cases of the Commonwealth and John H. Stonebraker and others, *indicted* in the Court of Quarter Sessions of Huntingdon county, for fraud and peculation on the Commonwealth." Your Committee have adopted the language of the warrant itself in describing the services supposed to have been rendered in the last mentioned case. It is however worthy of remark that, so far as they have been able to inform themselves, there was no such case as those described, the bills, without the finding of which there could be no indictment, having been returned "ignoramus" by the Grand Jury of that county. It is obvious therefore, that no very urgent case of State necessity could have existed for the employment of extraordinary counsel, unless the Commonwealth had been entirely unrepresented in that district. That such however could not have been the fact is apparent from the circumstance, that in one of these cases the Prosecuting Attorney himself was mulcted in the costs—a circumstance which may be regarded as tolerably conclusive evidence that the whole affair was any thing but a strong case for the prosecution.

But there is something further in this particular instance which is equally deserving of observation. The services are alleged in the warrant to have been rendered at the suggestion and under the employment of the Attorney General, and not of the Governor himself, as in the former cases, so that we have a practical extension of the doctrine embodied and inculcated with so much earnestness in the argument of the Auditor General. The power originally claimed only for the Executive, is now transferred to his subordinate, and the authority to employ special counsel to do the work of his own deputies, is recognized as an independent power in the Attorney General himself! All that is required of that officer is to certify the fact to the Executive, and forthwith the warrant parts from the Executive shaft, with just so much momentum as he may be pleased to bestow, and, regardless alike of the bolts and bars of the Constitution, wings its way with the directness of an arrow, into the deepest recesses of the public Treasury.

Here then, in these two cases, are some of the early but bitter fruits of the seed which was sown, and nursed, and stimulated into rapid germination, by the inquiry and report of the last session. Here are the first of the practical consequences of the unbounded license which was defended and encouraged by that extraordinary proceeding. Your Committee have already suggested, by way of showing the absurdity as well as the danger of the doctrine against which they have been contending, that it would authorize the employment and payment of counsel, for the purpose of turning out a rightful Judge as well as a usurper, and lo! it has been already done! They have also remarked that if the Governor could retain and reward an attorney in one case, he might do it in every case; and behold the case of John H. Stonebreaker straightway rises up before them, as though these cases had been specially interposed for the purpose of illustrating the argument, commanding the public attention, and arresting in its outset, a practice which threatens, if indulged, to sweep away all the defences of the public Treasury.

But if the authority to employ counsel or to draw money, in any case, from the Treasury, without "appropriations made by law," may be fairly implied from the general duty of "taking care that the laws be faithfully executed," it must be, under the general doctrine already announced, only in those cases where such an authority is absolutely *necessary* to the proper performance of the duties enjoined. Did such a necessity exist then in the present instance? Clearly it did not. The Commonwealth is never *inops consilii*. It has its own counsel, the Attorney General and his deputies, whose duty it is, in all criminal cases *ex-officio*, and in all civil cases where the Commonwealth is interested, by virtue of a positive regulation, to appear in its behalf. The Attorney General is a common law officer who holds the same relation towards the State as his exemplar in England does towards the Crown. There he is the King's own counsel; here he is the counsel of the Commonwealth. The writ of *quo warranto* is moreover at common law "in the nature of a writ of

right *for the King* against him who claims or usurps any office, or franchise, or liberty to inquire by what authority he supports his claim, in order to determine the right." 3 *Bl. Com.* 262. Our act of Assembly on the same subject establishes no new writ. It merely ascertains the jurisdiction, regulates the practice, and extends the remedy; but even in cases of a purely private as well as civil nature, it makes it the duty of the Attorney General to prosecute on the part of the State. In the present instance, the office usurped was a public office, one that concerned the people at large, and as such, the right was only examinable in the Supreme Court. The usurpation, if any, was upon the Commonwealth. It partook of the nature of a misdemeanor, and the counsel of the Commonwealth was as completely bound to prosecute the writ as though it had been an indictment concluding "against the peace and dignity" of the same. That his own views of duty did not in this particular differ from those of your Committee, is apparent from the fact that he did so prosecute it. But was the Governor bound to pay him for doing merely his duty, for which the law had already provided him a compensation? Could not that functionary "execute the law" through its sworn officer—was he not able to move that Executive machine, the Attorney General, without what has been so aptly and emphatically styled by the Auditor General the "means" of doing so, or, in other words, without oiling its joints and stimulating its action by unwonted largesses from the public Treasury? The suggestion that he could not, is one which is by no means flattering to that officer himself. Your Committee are, however, not responsible for it. It is merely a corollary from the propositions of the Auditor General.

But there is another consideration not less personal to this officer, which is an equally legitimate deduction from the general argument, and has not yet been made a subject of notice on the part of your Committee. To make out their case of necessity, the defenders of the Executive must be compelled to admit, that it was equally necessary to employ additional counsel for the purpose of *assisting* the Attorney General. Was there any such necessity as this in the present instance? If there was, the Governor has been unfortunate in his selection of his chief law officer, and the insinuation of that dignitary that the Senate is not "qualified to judge" in a case of this kind, has no better warrant than a mere accidental commission flowing from the grace of the Executive, which, while it may imply, has never been understood to *impart* any very extraordinary merit to the holder, and has no other faculty, that your Committee has ever understood, than that of clothing a lawyer with the mere name and attributes of office. If there was not, then the employment of James M. Porter, and the payment to him of an additional fee of one thousand dollars, was not authorized, even upon the argument of the Attorney General himself. From this dilemma he will find it difficult to escape.

But admitting, for the sake of argument, that the Attorney General was under no obligation to perform this duty himself, or that he was not competent to discharge it properly without assistance, and that it

accordingly became necessary for the Executive to employ either one or both of the individuals named, there is still a link wanting in the argument to render the defence complete. Was it *necessary* that he should determine the amount of the compensation, and draw his warrant on the Treasury for its payment? If it was not, the argument fails, and the act itself was unlawful upon the showing of the House of Representatives and the Auditor General themselves. How stands the case, then, in this aspect?

It is admitted, that if there existed any authority to *employ*, the service rendered would, in equity, create a claim upon the Treasury. Such claim, however, would be unliquidated in its nature, and subject, of course, to the usual mode of adjustment. Have our laws, then, made no provision for such a case, or does the argument of *necessity*, which has been well denominated "the tyrant's plea," again interpose to erect the Executive into an accounting officer, and place the key of the Treasury in his hands? Unhappily for those who may so reason, the wisdom of the Legislature has already pointed out a mode for the settlement of such accounts which leaves not even the shadow of a pretext for Executive interference. The act of the 30th March, 1811, entitled "An Act to amend and consolidate the several acts relating to the settlement of the public accounts, and the payment of the public moneys," has made ample provision for this and every other case which can possibly arise. The *first* section of that Act provides, *inter alia*, that "the accounts of *all persons having claims upon the Commonwealth*, except as thereinafter excepted, shall be *examined* and *adjusted* by the *Auditor General*, according to law and equity." The *third* section of the same Act requires that the accounts *so examined and adjusted*, shall be submitted to the State Treasurer for his *revision* and approbation.—The *sixth* section makes it the duty of the *Auditor General* to draw his warrants on the State Treasurer for the amount or balance of all accounts settled agreeably to the said Act, which are in the nature of claims on the Commonwealth, and "*for which there is an appropriation made by law*;"—and the *seventh* section declares that "in all cases where the laws recognize a claim on the Commonwealth, and *there is no appropriation* to pay the same, it shall be the duty of the Auditor General and State Treasurer to *adjust and settle* the amounts of such claims as other accounts, and the Auditor General shall immediately report the same to the Legislature, if in session, but if not in session, then during the first week of the next ensuing session. By the eighth section, moreover, the State Treasurer is required to pay "all grants, salaries, &c., established by law, and make all other payments which are or shall be so fixed by law, that the sum to be paid cannot be affected by the settlement of any account, nor increased or diminished by the discretionary powers of the Auditor General and State Treasurer."

It is apparent then from this summary of the leading provisions of the accounting law, that if the employment of these men created any claim upon the Commonwealth, it became at once the duty of the

Auditor General himself to *settle* and *adjust* it; and if there was, as he alleges there always is, "a fund in the Treasury provided for the neeessary contingent expenditures of exeeuting the laws," or, whieh is the same thing, an "appropriation," or sum set apart or speeially assigned for that purpose by law, to draw his warrant for the amount or balance thus ascertained, upon the Treasurer. If on the other hand there was no appropriation of money to pay it, it was equally his duty to settle the account, and report the same to the next Legislature, in order that they might make the neeessary provision for its discharge. Neither of these things however has he done in the present case. There was no settlement of an account, no warrant by the Auditor General, no report to the Legislature. The warrant was by the Exeeutive himself immediately upon the Treasury, in a manner entirely unknown to the law, and without even any of that *supervision* on the part of the accounting department whieh was supposed in the resolution of the last House of Representatives to have been exereised, and was admitted by the same resolution, as well as by the reply of the Auditor General himself, to be an essential requisite to the legality of the proceeding. This exemption from all control or limitation was however a neeessary ineident of the right itself and of the process by whieh it was enforeed. If it existed at all, it was obvious that it must be unlimited and uneontrollable in its very nature, as your Committee have already argued, inasmueh as the very moment it fell under the supervisory powers of the accounting departments, the right itself was gone, and the authority now complained of was transferred to the aeeounting officer to be exereised under the laws. The Auditor General had sagacity enough to perceive the diffieulty. He felt that the assertion of power to draw money from the publie Treasury, limited only by the diseretion of the Exeeutive himself, was essential to the defence of that offieer. He knew at the same time that sueh an assertion would be fatal to his argument, because it would be too strong for the publie mind. He aceordingly asserts and denies it in the same breath, claiming for the Governor the right of judging *in the first instance*, of the propriety and reasonable amount "of the warrant," and then qualifying and softening it down by the phrase, "subject of course to the proper accounting departments." The qualifieation is obviously fatal to the right itself. But it goes further. The zeal of the aeeounting offieer to defend the Exeeutive has betrayed him into an admission of a negleet of duty on his own part. If the right of the Governor was "subjeet to the proper aeeounting departments," its exereise in the present ease should have undergone his scrutiny, and reeeived his approval, before the payment of the money. He should have known all the facts, he should have had all the vouehers before him so as to have been enabled to judge of "the propriety and reasonableness of the expenditure," he should then have transmitted them to the State Treasurer, for his revision and approbation, and he should *after* all this, and not before, have drawn the warrant himself. Settlement and adjustment *after* payment would be a new mode of guarding the public Treasury, and one for which

your Committee can find no sort of authority in the accounting law. On the contrary, the Treasurer is authorized to make no payment without a settlement in the first instance, except "where the same is so fixed *by law* that it cannot be affected by the settlement of any account, or increased or diminished by the discretionary powers of the accounting officer," and it may be remarked that if the sum specified in a case like the present cannot be affected by a settlement, or increased or diminished by the discretion of the accounting officers, then the whole admitted supervisory power goes for nothing. And yet notwithstanding all these admissions of power and duty, the Auditor General informs the House of Representatives that "he had no correspondence with, or vouchers from, nor exchanged opinions with either of the gentlemen named, but that the amount was settled and the vouchers returned to his department by the State Treasurer *after payment*," and even ventures so far as to add that, "as the inquiry seemed to have a more direct relation to the Governor than to his department" he had referred the matter to that officer himself! The warrants themselves are admitted by him to be "subject to the accounting department," and yet the head of that very department does not seem to recognize the propriety of a reference to him, in regard to a matter which, by his own admission, he is authorized, and of course required to supervise. It may sound strangely to the public that he should have turned the inquirers round to the Executive, but he had already, as he substantially and very candidly admits, left the whole matter to the discretion of that officer, and his reference is accordingly in perfect harmony with the previous surrender of his high powers into the same hands. In this particular he is at all events consistent.

It is due however to the accounting officer to say that he does undertake to atone for his neglect at the appropriate time, by pronouncing a tardy opinion in regard to the reasonableness of the amount paid in these two cases. The grounds on which he rests that opinion are however so remarkable, that its value cannot be fairly appreciated without knowing them. "On referring" he says, "to the sums paid for services similar to those rendered by the Attorney General and James M. Porter in the two cases (those of Messrs. Binney and Sergeant,) mentioned in the above resolution, I find that they have exceeded the amount paid to these gentlemen. *I do not therefore think it is unreasonable in amount.*" This is a summary mode, certainly, of disposing of a grave question on which, by his own admission, he was required to pass judgment as an accounting officer. He profits by the suggestion of the House of Representatives, seizes upon the cases referred to by them as a standard of comparison, declares the services to be "similar," when he could not have known the fact, and there was in truth no resemblance, and very sagely infers the reasonableness of the amount from the fact that it was not quite equal to the compensation allowed in another case of an entirely different character. Your Committee had supposed that the reasonableness of a claim was only to be estimated by a comparison of its amount with the services actually rendered. The Auditor General has adopted a standard in re-

lation to attorney's fees which, besides being entirely new, has the advantage of being infinitely more convenient. The only criterion hereafter will be the sum paid to Messrs. Binney and Sergeant. Any thing which exceeds that amount will be considered exorbitant, and any thing which falls below it entirely reasonable.

But we are informed by the same officer that "there is at all times a fund in the Treasury provided for the necessary contingent expenditures of executing the laws." Your Committee are not aware of the existence of any such fund, and they cannot withhold the expression of their regret that he has not condescended to inform the House what that fund is, or how, or when it has been provided. There was a time when the contingencies of the Executive Department were provided for by annual appropriations, for the expenditure of which the Governor himself, or the Secretary of the Commonwealth, was required to render an annual account to the Legislature. That wholesome practice has indeed, with many others equally salutary, fallen of late years into disuse. The contingencies of the Executive Department are now settled, as your Committee are informed, like other accounts, but they have never heard of any instance wherein the payment of a counsel fee has been charged upon any such fund, or even assigned to that class of expenditure. The report of the Auditor General himself at the last session of the Legislature arranges these very payments, not amongst the "contingencies of the Executive Department," not even amongst the "Expenses of Government," but under the more general head of "Miscellaneous items," being such as are of a nondescript character, made generally under the authority of some special act of Assembly, and not properly referrible to any other branch of the usual classification. If they were really "incidental to the Executive department," and supposed by him to be, as he describes them, of that character, it is not easy to account for his departure from that notion in the arrangement of the accounts, unless it is to be attributed to the same confusion of ideas, the same principles of generalization and distribution which have given in the same report to the Attorney General a place in the ranks of the Judiciary!

It is asserted with great confidence by the same officer, that "no one has ever doubted his construction of the Constitution and the *law*," that "*numerous* instances have occurred in Pennsylvania, where money has been paid as compensation to counsel in the same manner that this money was paid," that "the present is, in his opinion, the first instance that the right of the Governor to draw his warrant, or the propriety of doing it has been disputed," and that "he had not yet seen any reason adduced against this mode of proceeding that seemed to him to shake, for a moment, the well settled construction of the Constitution acted on for many years." The opinions of the Attorney General, who is not, however, the law adviser of the Senate, nor the proper adviser any where in this particular case, and from whose authority your Committee therefore take the liberty of dissenting, are entirely coincident with these. He too supposes the whole matter to be "indisputably plain;" he is "satisfied

beyond doubt, that the Governor had a *clear* right to draw his warrant in this instance;" he also describes it as "a right that has been repeatedly exercised by former Executives, since the adoption of the first republican Constitution," and he is equally scandalized by the doubts of the unbelieving. Your Committee are not surprized either at the *satisfaction* with which he has regarded the exercise of the power assumed in the present case, or the unusual *clearness* which has flowed from that very comfortable feeling. Nor have they flattered themselves with the hope that any *reason* which *they* could *adduce*, would have the effect of either disturbing that satisfaction or shaking the "well settled" convictions of his learned coadjutor. The question is now before a higher tribunal, on an appeal from the judgment of these Executive officers, and your Committee venture to believe that however confidently that judgment may have been pronounced, they have at all events shown that the power claimed for their Executive head, is by no means so "indisputably plain," so *undoubted*, or so perfectly *clear*, as those gentlemen may in their zeal have been induced to suppose. They would have felt relieved if these functionaries, instead of indulging in vague and general assertions as to the law and the practice, had condescended to come down to details—to point out the *law* of which the construction is alleged to be so well settled, and to indicate a few of "the numerous instances," alleged to exist, in which money has been paid to counsel in the same manner. They have not, however, ventured upon that ground. The opportunity was afforded to the Auditor General in the call of the House of Representatives, for a reference "to the Act or Acts of Assembly under which the said fees were allowed," but for reasons best known to himself, he did not choose to improve it. Instead of a compliance with that call, he contents himself with a mere rehearsal of the constitutional provision suggested by his querists, and puts them off with the assurance that "nobody has ever doubted his construction of the *law*"—and this is all that we hear of the law itself! So too with regard to the "numerous instances" of the like kind which have so well settled the construction of the Constitution. We are not informed when they occurred, or where they are to be found, but are left to grope for them without a guide through the impenetrable darkness in which they seem to be involved.

We are not, however, without a feeble light from another quarter on this important point. The very commendable industry of the House of Representatives has collected and paraded in the way of authority a few of the "numerous instances" which are relied on as examples of the exercise of a like power under former administrations. They consist of the cases of Messrs. Binney, Sergeant, and Douglass, and as they may be considered a fair specimen of the class which they have been singled out to represent, and will as such furnish an adequate notion of the species of authority by which this *long* practice is supported, your Committee will bestow on them a brief examination.

The gentlemen in question were employed by the late Governor

Wolf, to represent the interests of this Commonwealth in the very important case of Livingston's Lessee vs. Moore and others, which was an ejectment pending in the Supreme Court of the United States, wherein those interests were involved to a vast amount.—They were, however, unfortunately for the analogy, employed, not by virtue of any inherent constitutional power such as is claimed in the present case, but in pursuance of the provisions of a positive law *conferring* that authority upon the Executive. If the zeal of the House of Representatives had permitted it to look into the circumstances of those cases, it would have discovered that they rested upon the authority of a resolution of the 7th April, 1830, relating to the claims against the estate of J. Nicholson, deceased. It would have discovered moreover, a want of resemblance to the present, in some other important particulars. It would have learned, for instance, that the gentlemen above-named, were not merely *retained* under the directions of an express law, but that their compensation for services rendered, in pursuance of that retainer, was settled and adjusted under the *law*, and not by the discretion of the *Executive*, and it would not have remained ignorant of the still more important and overwhelming fact, that the warrants for its payment were drawn by the *Auditor General*, and not by the Governor! The result of such an examination would have satisfied every candid mind that the references were singularly unfortunate, and that the cases which were thus singled out as authorities in support of this new exertion of Executive power, did not merely fail to sustain the practice which they were quoted to defend, but, so far as legislative construction could be relied on as a means of ascertaining the sense of the Constitution, furnished an unanswerable argument against the existence of any such power.

If the foregoing examples, especially relied on as authorities and distinctly recognized by the Auditor General as a proper standard of comparison in a case where there is not the smallest feature of resemblance except the absolute *amount of compensation*, are, in the judgment of that officer or of the Attorney General, "instances" of the like kind with those now under consideration, then they were perfectly right in supposing them to be "numerous." Our statute books indeed abound with them "from the period of the adoption of the first republican Constitution" down to the present time, and as they all carry with them the most conclusive evidence that no such authority as that now claimed was ever before supposed to belong to the Executive of this State, your Committee will cite a few more of them by way of example.

The earliest which has fallen under their notice will be found on page 316 of the Journals of the Assembly of 1778. It was a resolution of that body, authorizing the Vice President and Council "to retain and employ such able counsel as they might think necessary to assist the Attorney General in the prosecution of public offenders and to make them a proper compensation for their services." The Council accordingly employed Joseph Reed, and the Assembly themselves, at their next session, voted him a compensation of two thou-

sand pounds. (Journal of 1779 page 310.) Many other cases follow in rapid succession. Amongst them are the Acts of 2d April, 1802, and 3d April, 1804, relating to controversies north and west of the Ohio and Allegheny rivers and Conewango creek—the resolution of 4th April, 1803, authorizing the Governor to employ counsel to assist the Attorney General in the famous Springettsbury Manor case, in York county—the Act of 9th February, 1805, authorizing the Governor to employ counsel to attend to the interests of the State in certain cases in the Supreme Court of the United States—the Act of March 10, 1817, authorizing the Governor to employ counsel in certain actions of ejectment brought in Beaver county, by the Representatives of George Croghan—the Act of 8th February, 1819, relating to the lien of this Commonwealth on the estate of Wm. Nichols, deceased, and the Act of 7th April, 1830, relative to the claims of the Commonwealth against the estate of John Nicholson, being the same Act already referred to as the authority under which Messrs. Binney, Sergeant and Douglass were severally employed. All these are, however, but a few of the many Acts of Assembly of a like character, which, though not to be found in our compilations, because temporary in their nature, an examination of our Rolls would readily disclose. Some of these Acts contain an authority to the Governor himself to draw his warrant on the Treasury, but generally, if not always, with a limitation as to the amount; others refer the settlement and adjustment of the claim to the Accounting Department, and direct the payment to be made by warrants drawn by the Auditor General; all of them deny, by the strongest implication, any authority on the part of the Executive either to *employ* counsel—to *determine the amount* of their computation, or to *draw his warrants* on the Treasurer for their payment. It would have been worse than idle to have *authorized* that officer by special law, to do what is now alleged to be either a sworn duty or an undoubted power, or to have imposed a limitation in a case where, if the authority already existed, as has been argued, *under* the Constitution, no law was necessary to bestow it, and no act of the Legislature could possibly take it away. Nor is it to be presumed that the powers of the Executive Magistrate were not as well understood by past Legislatures as they are by officers of the Executive creation at the present day.—Such a presumption would be quite too violent for your Committee, however much they might be inclined to defer to the superior wisdom, the spirit of improvement, or the greater practical experience which has distinguished the present era in the affairs of this State.

The examination which your Committee has been enabled to bestow on this part of the case has resulted in the persuasion that if the right of the Governor to employ counsel and draw his warrants at pleasure for their payment has never been questioned, it is only because it has never been exercised. No instance has either been pointed out by others, or discovered by themselves, wherein the apparently uniform construction of the Constitution derived from the many Acts of Assembly to which they have referred, has been con-

tradicted or even disturbed by the practice of the Executive Department. They are of opinion that none such can be found to exist under any former administration. But whether they be right or wrong in this particular case can make no difference. No precedent however strong—no uninterrupted series of precedents would authorize a departure from the plain provisions of the Constitution. Even an Act of Assembly which should give to the Executive the formidable power assumed in the argument on which they have been animadverting, and thus surrender, as it would in effect, the whole Treasury into his hands, would be a clear violation of the spirit of that instrument, and an infamous betrayal of the high trust reposed in the hands of the Representative. There is, however, no such Act of Assembly, and never has been, as your Committee verily believe, even in times of civil commotion or of great and imminent danger from the invasion of a public enemy. The only case indeed known to them, wherein an authority *approaching* this one in magnitude has ever been vested in the Executive Magistrate, is precisely the one just described, or in other words, a great public emergency, where the operation of the laws is suspended by intestine commotion, or the safety of the State endangered by external violence. Such cases, of course, form an exception to all rules, and may sometimes make the law of necessity to supersede all other laws, and even to ride over all constitutional limitations, and it is only in a case of that kind that the powers of the Executive have been extended to their utmost breadth. There, however, the emergency must first arise, and there moreover the proper application of the money drawn from the Treasury is secured by law, and the accounts subjected to an adjustment by the proper officers, under a rate of compensation fixed and ascertained by the law itself.

It is worthy of remark, in connexion with this subject, that there is still another case arising out of the law just quoted, which is referred to by the House of Representatives as an example of a like power exercised under a former Administration. It is that of a warrant drawn by Governor Ritner in favor of a certain A. J. Pleasanton, as Paymaster General of the forces assembled at Harrisburg for the purpose of suppressing the disturbances which occurred there at the opening of the session of the Legislature of 1838-9. In this case, however, as well as in those which have been already examined, the defenders of the Executive are met by another Act of Assembly which is equally fatal to their argument. The warrant now in question, was drawn in conformity with the provisions of the 63d section of "the Act for the regulation of the Militia of this Commonwealth," passed on the 2d day of April, 1822. (Purd. Dig. 6th ed. page 768.) But this was not all. There was more in this case which renders this quotation still more unfortunate than the others. The warrant to which it refers was not merely drawn under the authority of an express law, but was moreover ACTUALLY REFUSED TO BE PAID, and that too by the very officer, (Daniel Sturgeon, Esq. then State Treasurer,) who afterwards threw open the doors of the Treasury in the

present instance to the clearly unauthorized requisitions of the present Executive! The refusal to pay in that case was made the subject of an Executive communication which will be found on page 169 of the 2d volume of the House Journal of the session of 1838-9, and it became necessary to supply, by special legislation, the failure on the part of that officer to perform his duty under the law. It is apparent, therefore, that the case referred to, instead of being an authority in point, is of a character so directly opposite, as to render it altogether impossible, on any principles with which your Committee are familiar, to reconcile the scruples of the Treasurer in the one case, with his extreme facility in the other. The authority to draw in the former was indubitable. Of the propriety of its exercise, the State Treasurer, who as Treasurer is a mere ministerial officer, had no authority to judge. His duty, therefore, was equally clear. He chose however to refuse the payment and to disobey the law. In the latter, there was no authority which has ever been shown, and yet the warrants of the Governor were paid without question! Why this remarkable discrimination was made in favor of those warrants which were entirely unauthorized, is not very apparent to your Committee, unless it may be referred to the fact that they were drawn by *different Executives*. The reason is not certainly to be found in the argument upon which the same officer thought proper, a little extra-officially to be sure, in his Annual Report on the Finances at the session of 1838-9, to condemn the borrowing, by Governor Ritner, of the amount required for the repair of the Huntingdon breach. If the argument be a good one in any case, it must be admitted on all hands, that the almost entire obliteration of some thirty miles of our most important canal by a most extraordinary and unforeseen casualty, in the very pressure of business, and during the recess of the Legislature, did constitute one of the most urgent cases of State necessity which can be possibly imagined. And yet there was no forgiveness for that Executive on the part of the stern and uncompromising officer who paid the very warrants of his successor, which are now defended on the same ground of necessity. It was a matter of no consequence to him that the money which had been borrowed by Governor Ritner for *State purposes*, had never been in the Treasury at all, and if not recognized by law was no charge upon the Commonwealth, and therefore not cognizable by him. He snuffed the danger from *afar*, and feeling it, doubtless, to be his duty to sound the alarm in advance, he steps a little out of his appropriate sphere, for the purpose of assailing that Executive, and signalizing his own zeal in defence of the Constitution. With great solemnity does he parade the important provision of that instrument which declares that "no money shall be drawn from the Treasury except in pursuance of appropriations made by law," and with equal solemnity does he arraign the then Executive for a breach of that provision, not in the drawing of money from the Treasury without authority of law, as in the present case—for that does not seem in his estimation to be any fault—but in the procurement, upon his own private responsibility,

of certain moneys which had never been in the Treasury at all—as though the offence consisted only in the fact that he had *not* drawn the money in question *from* the legal depository of the public funds. Your Committee will take the liberty of quoting a portion of the homily in which he indulges upon this occasion. It is as follows:

"The twenty-first section of the Constitution, (the one above recited,) was designed to fix the definite powers of the several branches of government in relation to its *money* concerns, so that one power might not, with impunity, usurp the power of the other.

"The power of drawing money from the Treasury was considered of such intrinsic importance by the framers of the Constitution as to deem it unsafe to trust it in any other hands than the immediate representatives of the people, and it is a power of too sacred a character to be violated on any occasion, and particularly so where there was a plain constitutional mode of avoiding it.

"The Legislature might have been convened, and the money legitimately obtained at a trifling expense as to money, and with little loss as to time; but money should not weigh for one moment against an open and palpable violation of the Constitution, by those who are sworn to be guided by its provisions."

All this is perfectly sound doctrine and has the hearty concurrence of your Committee. They agree that the constitutional provision was designed to raise a wall of partition between the Executive and the Treasury, and they declare his act unconstitutional, because he has passed that wall in the present case. They admit that the power of drawing money from the Treasury was considered of so much importance, as to be deemed unsafe in any other hands than those of the representatives of the people, and particularly so when there was a plain constitutional mode of avoiding it, and they condemn his act, because he has exercised this great power without the authority or assent of the Legislature, when there was an obvious mode of avoiding it, by directing the Attorney General to do his duty, and throwing him upon the Legislature for his compensation, if not sufficiently rewarded for its performance by the salary and fees which he already receives. They acquiesce too most cordially in the great principle which should be written in letters of gold on the doors of the public Treasury, as well as on the heart of every officer in this goverment, that "money should not weigh for one moment against an open and palpable violation of the Constitution by those who are sworn to obey its provisions," and therefore it is, and not because of the paltry two thousand dollars which were paid away in this case, that they have dwelt so long and with so much emphasis on this dangerous infraction of the Constitution. Their own argument is but an amplification of these great principles; the passage which they have quoted is in itself a complete and overwhelming answer to all the reasoning of the last House of Representatives and the Auditor and Attorney Generals, and they are most happy to find that they are sustained by such high authority in a controversy with a combination of antagonists so powerful as these. They only regret that it should

have been so soon forgotten. Alas! for the frailty of our common nature! but a few short months had elapsed before all this virtue had exhaled, and all these great constitutional principles were trampled under foot by the very officer who had enunciated them with so much solemnity! It is due, however, to his successor (Almon H. Read,) to say that with less pretension and without any better understanding of his duty, he discarded the example and peremptorily refused the payment of the warrant drawn on him.

But there is another view of this case which is peculiar to the Attorney General, as one of the recipients of the Executive bounty. Your Committee have already intimated their opinion, that it was a part of his duty to prosecute the several writs of *quo warranto* which have been recited, and have suggested that for his general services as the recognized public counsel of the State, he was already in the receipt of an annual compensation from the public Treasury. The amount of that compensation has been quoted in the resolution of the House of Representatives, as "only three hundred dollars," by way of apology for the Executive warrants in his favor. Your Committee might have shown, perhaps, that if there was any deficiency in this respect, it had been abundantly supplied by the very ingenious device of appointing "*agents*" instead of "deputies" in the city and county of Philadelphia, for the purpose of evading the provisions of the act of Assembly which forbids the Attorney General from receiving any proportion of the fees of prosecution from any of his deputies, and makes it the duty of the said deputies to pay over all fees received by them in any one year above the sum of one thousand dollars into the Treasury of the Commonwealth. They might have shown moreover that the fees and emoluments of the present Attorney General were many times greater than the whole amount of his salary. With these questions, however, they have nothing to do. The sufficiency or insufficiency of the compensation of that officer is not properly before them. It is a question which belongs to the Legislature, and has, no doubt, been settled by them on grounds entirely satisfactory to themselves, and it is not now proposed to make any change in that particular. Whenever a complaint shall be suggested and an application made to the proper authority for its increase, it will unquestionably be reconsidered with all proper fairness and in the true spirit of justice. In the meantime, however, your Committee cannot recognize the legitimacy of any argument in defence of the warrant in his favor, which may be drawn from its supposed inadequacy. The Act of 1791 declares that it shall be "a full compensation for his services," and that too in terms so strong that it became necessary to provide at the next following session that it should not be construed to deprive him of the fees previously fixed by law. It has been since reduced in amount by the act of 1821. If it be inadequate, the remedy is not with the Executive. It is not for him to revise the judgement of the Legislature, or even to correct any injustice with which it may be fairly chargeable, by supplying the deficiency himself. Such a power would soon raise up a pension roll at

least, if it did not dethrone the Legislature and unsettle the very foundations of the Government.

There is something further, however, to distinguish the case of the Attorney General from that of his professional coadjutor. He is not merely in the enjoyment of a salary, but he is entitled, as already intimated, to certain *fees* which are limited and ascertained by law; and by the 26th section of the act of 28th March, 1814, establishing a Fee Bill, which is specially re-enacted by the 15th section of the act of 22d February 1821, it is provided that "if any officer whatsoever shall take greater or other fees than is therein expressed and limited for any service to be done by him in his office, *or shall charge or demand any fee for any service or services other than those expressly provided for by that act*, such officer shall forfeit and pay to the party injured fifty dollars, to be recovered as debts of the same amount are recoverable; and if the judge of any court within this Commonwealth shall allow any officer, under any pretence whatever, any fees under the denomination of *compensatory fees* for any service not specified in that or some other act of Assembly, it shall be considered a misdemeanor in office." In the case of a *quo warranto* it is true that there are no fees appointed in the acts of Assembly regulating their amount. There is nothing however in that circumstance. The act prohibits equally the charging or demanding of any fees for any service or services other than those expressly provided for by it, and it has already been determined by the Supreme Court of this State that the performance of no omitted duty, however arduous, will entitle any of the officers enumerated, either to *charge* or *demand* any, even the smallest, compensation for their services. The Attorney General is one of those officers. His case therefore falls, in the opinion of your Committee, within this strong prohibition. If he has charged or demanded a fee for any services not specified in the Fee Bill, he has subjected himself to the penalties of the law, and if the judges of any court had allowed him any fee in the way of compensation for any such service, it would have been a high misdemeanor in them. But the Executive has done precisely the same thing in the present instance. Whether the Attorney General made any *charge* or *demand* on him, can make no difference. The warrants in *his* favor were drawn not merely *without* law, but *against* law, and they were presented at the Treasury, and the money demanded there, and paid according to their tenor, and in defiance of both the acts of Assembly to which your committee have referred. No technical plea can therefore avail the Attorney General. The defence that he had made no *charge*, even if true, would only recoil upon the Executive himself. The payment would then resolve itself into a mere voluntary donation or gratuity answering no claim, and flowing merely from the unsolicited bounty of the Executive. In either case it would be unlawful.

But if the case of the Attorney General is somewhat distinguishable in the political relations of the officer, from that of his coadjutor, there is something in the *natural* relations of the latter to adjust the balance

to some extent between them. He was as already observed the brother of the Executive, and although your Committee might not have been disposed to find fault with his employment on that account, if the authority had existed, and the question of compensation had been referred to the accounting department, they cannot but regard it as strongly objectionable in a case where the amount depended on the mere will or pleasure of the Executive. The ties of blood are recognized in this State as a sound objection to a judge, as they have always been considered a good cause of challenge to a juror, and there is, in the judgment of your Committee, no reason connected with either of these cases, which does not apply with equal force to the exercise of a *discretion* such as that which has been assumed by the Executive in the present instance. If the identical claim had been referred to a court of justice for adjustment, it is perfectly clear that the Governor could not have acted in either capacity.

Your Committee are therefore, upon a full view of the whole question, and for the reasons assigned by them at so much length, decidedly of the opinion that the several disbursements recited in the resolution under which they have acted, were made without any authority of law, and in direct and obvious contravention of the Constitution. Whether the moneys thus illegally disbursed might not be recovered back by action against all the parties concerned in their abstraction, it is not necessary for them to determine. With reference to the responsibilities of some of those parties, there are higher considerations which it would not become this Senate to agitate. With others, it would be equally unbecoming, because it is unnecessary for the Legislature to interfere. The question involved is one of great interest to the people. It is not a question of *money*, but of *principle*. The amount withdrawn from the Treasury, large though it certainly be, is nothing when compared with the terrific import of the argument by which its abstraction is defended. It is proper however that it should be reclaimed. Your Committee have been instructed to bring in a Bill for that purpose, as well as to prevent the recurrence of a similar error in future. For the latter object it is unnecessary to provide. The Constitution has done that already, and it carries the means of self-vindication, the antidote against all infractions, in its own bosom. For the former the remedy is obvious. The State Treasurer himself, the disbursing officer of the Commonwealth by whom these moneys were paid, who is belted round with the pledges which he has given to the people for the faithful performance of his trust, is before them. In that direction the public is at least secure. A direct recourse to him has moreover this advantage, that while the principle may be fairly tested, the whole amount may be recovered, if illegally paid, in a single action, and a multiplication of suits which is always an evil, be avoided. The argument of convenience is moreover enforced by the still stronger argument of public policy. If the officer in question has offended wilfully and knowingly in the premises, it is highly proper that the loss, if any, should be cast on him, and that he above all others, should make that atonement which

is due to the violated majesty of the law. The Attorney General is but an accessory. Whether he would be liable over to the Treasurer, in the event of a recovery against him, is at least doubtful.—Your Committee are inclined to think that he would not be so liable. He may however indemnify that officer to the extent of the payment made to him, and thus become a party in interest, or perhaps it may please the Legislature, if he is desirous of a controversy with the State, to gratify him in that particular, by directing a separate and concurrent action against him as well for the amount which he has received in fraud of the Constitution, as for the penalties which he has incurred under the Act of Assembly. If your Committee had consulted their own private inclinations, they would have recommended such an action; they have only declined it because the ends of public justice did not seem to require them to go beyond the Treasurer himself. If, however, the Senate shall think differently on that point, they will acquiesce most cheerfully in the decision.

And having thus expressed their opinions, as they were required to do, for the satisfaction of this body, but without any desire to forestal the judgment of that tribunal to which the question properly belongs and to which they propose to refer it without prejudice to the rights of the defendants, and for the purpose of securing to them a full investigation and a fair and impartial decision, they conclude their task by reporting the following Bill in conformity with the views which they have so fully disclosed :

An Act

TO AUTHORIZE A SUIT TO BE BROUGHT ON THE OFFICIAL BOND OF DANIEL STURGEON, LATE STATE TREASURER.

SECT. 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That the State Treasurer be, and he is hereby authorized and required to cause a suit to be brought against Daniel Sturgeon, late State Treasurer, and his sureties on his official bond, for the recovery of certain moneys paid by him on four several warrants, amounting in all to the sum of two thousand dollars or thereabouts, drawn by the present Executive of this Commonwealth in favor of a certain Ovid F. Johnson and James Madison Porter, Esquires, for professional services alleged to have been rendered by them in the cases of two several writs of quo warranto, issued against Isaac Darlington and Oristus Collins, Esquires, then claiming to be judges of the and judicial districts of this State, and if, on the hearing of the said cause, the court shall be of opinion that the said moneys or any part thereof, were paid without lawful authority, they shall enter a judgment for the Commonwealth for the amount so paid, with lawful interest thereon from the time of said payment or payments, any settlement or alleged settlement of the account of said Treasurer subsequent to the said payment or payments to the contrary notwithstanding; the said suit to be brought in the county where the said Daniel resides, and the process to be served on all the parties defendants in the said action in any other county of this Commonwealth.

SECT. 2. That it shall be the duty of the said court, on the hearing of the said cause, to admit in evidence certified copies of the vouchers or accounts on file in the office of the Auditor General or State Treasurer.

SECT. 3. That the said cause shall be put to issue as speedily as practicable, and shall be entitled to precedence in the order of trial in the court in which the same shall be brought, and if a judgment shall be rendered against the Commonwealth upon the hearing, it shall be the duty of the President Judge of the said court to reduce his opinion to writing, and file the same in the cause, and the State Treasurer

shall thereupon remove the same, together with all the proceedings thereon, to the Supreme Court of the proper district for final adjudication.

Sect. 4. That the State Treasurer be, and he is hereby authorized to employ one or more counsel learned in the law, to attend to the interests of the Commonwealth in the said cause, and to make them suitable compensation therefor out of any money in the Treasury not otherwise appropriated: *Provided however*, That the said compensation shall not exceed the sum of dollars.